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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Jace F. Eden,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.  
14

No. CV-15-08020-PCT-DGC

**ORDER**

15  
16 Petitioner Jace Eden filed a Petition for Writ of Habeas Corpus pursuant to 28  
17 U.S.C. § 2254. Doc. 1. On January 12, 2016, Magistrate Judge Metcalf issued a 65-page  
18 Report and Recommendation (“R&R”) that the Petition be dismissed with prejudice.  
19 Doc. 34 at 64. Petitioner objected to the R&R. Doc. 37. The Court will deny the  
20 objections and accept Judge Metcalf’s recommendations in full.

21 **I. Background.**

22 Petitioner seeks habeas relief from a sentence imposed by the Navajo County  
23 Superior Court on April 5, 2012. That sentence is based on the revocation of probation in  
24 two cases: (1) a 2007 aggravated driving under the influence (“DUI”) conviction; and  
25 (2) a 2009 stalking conviction. It is also based on two new convictions: (1) a 2009  
26 aggravated DUI; and (2) a 2011 sexual abuse. Petitioner entered into a consolidated plea  
27 agreement and received an effective sentence of 5.75 years.  
28

1           **A.     2007 DUI, CR2007-01075 and CR2009-00017.**

2           Petitioner was indicted twice for events occurring on or about June 7, 2007.  
3           Doc. 26-1 at 13 (CR2007-01075), 18-19 (CR2009-00017). The first indictment included  
4           one count for aggravated DUI on a suspended license. *Id.* at 13. The second indictment  
5           included two counts: (1) aggravated DUI as a third DUI offense within 84 months; and  
6           (2) aggravated DUI with a blood alcohol content of 0.08 percent or more as a third DUI  
7           offense within 84 months. *Id.* at 18. The cases were subsequently consolidated for  
8           purposes of trial under Rule 13.3 of the Arizona Rules of Criminal Procedure. *Id.* at 27.  
9           Petitioner was represented in this consolidated matter by attorney Kate Roberts. *Id.* at 15.

10          After a two-day trial, the jury returned the following verdict: (1) not guilty as to  
11          count one, aggravated DUI with a suspended license; (2) guilty of the lesser-included  
12          offense of count one of driving while impaired to the slightest degree; (3) guilty as to  
13          count two, aggravated DUI as a third DUI offense within 84 months; and (4) guilty as to  
14          count three, aggravated DUI with a blood alcohol content of 0.08 percent or more as a  
15          third DUI offense within 84 months. Docs. 26-1 at 135; 26-2 at 58-65. On August 27,  
16          2009, Petitioner was sentenced to four months of incarceration with credit for one day  
17          already served, and four years of probation, to run concurrently. Doc. 26-2 at 69-70, 95.

18          Petitioner challenged his conviction on direct appeal. Petitioner was represented  
19          during the appeal by attorney Benjamin Brewer. *Id.* at 97. Petitioner raised four  
20          arguments: (1) the trial court erred in denying his request for sanctions based on the  
21          State's untimely disclosure of the traffic stop and DUI investigation recording; (2) he was  
22          denied due process by the recording's untimely disclosure; (3) he was denied the right to  
23          cross-examine and confront witnesses with the recording; and (4) the trial court erred in  
24          denying his request to stay his imprisonment pending appeal. *Id.* at 98. The Court of  
25          Appeals rejected each argument. *Id.* at 111. The court vacated, *sua sponte*, Petitioner's  
26          conviction of the lesser-included offense of count one, driving while impaired to the  
27          slightest degree, because it was also a lesser-included offense of the aggravated DUI as a  
28          third DUI offense within 84 months charge, of which he was convicted. *Id.* at 111-13.

1 The court found that this duplicate conviction violated Petitioner's double jeopardy  
2 rights. *Id.* at 113.

3 Petitioner filed a petition for review with the Arizona Supreme Court. *Id.* at 116-  
4 25. Petitioner sought review only on the trial court's failure to grant a continuance as a  
5 sanction for the State's untimely disclosure of the recording. *Id.* at 117. On August 1,  
6 2011, the Arizona Supreme Court denied the petition for review. *Id.* at 127-28.

7 **B. 2009 Stalking, CR2009-00700.**

8 Petitioner was indicted for events that occurred between February 2007 and April  
9 2009. The indictment contained counts of stalking and influencing a witness. *Id.* at 156-  
10 57. Petitioner was represented by attorney Kate Roberts. *Id.* at 186. After a two-day  
11 bench trial, the court entered a verdict of: (1) guilty as to the stalking count; and (2) not  
12 guilty of influencing a witness. *Id.* at 192. On July 9, 2010, Petitioner was sentenced to  
13 two days incarceration with credit for two days already served, and three years of  
14 probation, to run concurrently with his probation term from the 2007 DUI. *Id.* at 221-22.  
15 Petitioner did not appeal the conviction or sentence. Doc. 34 at 6.

16 **C. 2009 DUI, CR2009-00960.**

17 Petitioner was indicted for events occurring on August 16, 2009. The indictment  
18 contained two counts: (1) aggravated DUI as a third DUI offense within 84 months; and  
19 (2) aggravated DUI with a blood alcohol content of 0.08 percent or more as a third DUI  
20 offense within 84 months. Doc. 26-3 at 12-13. The indictment was subsequently  
21 amended to allege Petitioner's prior felony convictions and his probationer status as of  
22 August 16, 2009. *Id.* at 24-26. Petitioner was represented by attorney Benjamin Brewer  
23 until May 25, 2011, at which point attorneys Ronald Wood and Dirk LeGate appeared on  
24 his behalf. Docs. 26-3 at 28; 26-4 at 23.

25 **D. 2011 Sexual Abuse, CR2011-00340.**

26 Petitioner was indicted for events occurring on or about May 13, 2011. The  
27 indictment was for sexual assault. Doc. 26-4 at 166. The indictment was subsequently  
28 amended to allege Petitioner's prior felony convictions and his probationary status as of

1 May 13, 2011. *Id.* at 182-84. Petitioner was represented attorneys Ronald Wood and  
2 Dirk LeGate. Doc. 26-4 at 23.

3 **E. Consolidated Plea Agreement.**

4 On September 1, 2011, Petitioner entered into a consolidated plea agreement  
5 covering the 2009 DUI charge, the 2011 sexual abuse charge, and the probation  
6 violations related to the 2007 DUI conviction and the 2009 stalking conviction. Doc. 26-  
7 4 at 154-56; *see also* Doc. 26-5 at 32-37. Petitioner was represented during the change of  
8 plea hearing by attorney Dirk LeGate. Doc. 26-4 at 154.

9 On December 13, 2011, Petitioner was not present for sentencing and the court  
10 issued a warrant for his arrest. Doc. 26-5 at 39. Attorneys Wood and LeGate were  
11 permitted to withdraw from representation. *Id.* at 41-42.

12 On December 28, 2011, Petitioner made an initial appearance on his bench  
13 warrant. *Id.* at 44. The court appointed attorney Sam Roser to represent Petitioner during  
14 sentencing, which occurred on April 5, 2012. *Id.* at 46-47, 70-73. Petitioner was  
15 sentenced to 5 years' imprisonment for the sexual abuse charge and 4.5 years for the  
16 aggravated DUI charge, to run concurrently. *Id.* at 71-72. Petitioner also received  
17 additional a concurrent sentence for violation of his probation from the 2007 DUI  
18 conviction. *Id.* at 73-74. Because Petitioner violated the terms of his probation for the  
19 2009 stalking charge, he received an additional 0.75 year sentence to run consecutively to  
20 the other sentences. *Id.* at 75. Petitioner therefore received an effective sentence of 5.75  
21 years, less time served, for the 2009 DUI conviction, the 2011 sexual abuse conviction,  
22 and violation of probation for the 2007 DUI conviction and the 2009 stalking conviction.  
23 Petitioner did not appeal. *Id.* at 79.

24 **F. Subsequent Proceedings.**

25 On May 25, 2012, Petitioner filed a pro se notice of post-conviction relief in the  
26 Navajo County Superior Court. *Id.* at 79-80. Attorney Brett Rigg subsequently appeared  
27 to represent Petitioner. *Id.* at 82. Rigg filed a notice of no colorable issues in the  
28 Superior Court and sought withdrawal, which the court granted. *Id.* at 85-86, 88.

1 On June 3, 2013, Petitioner filed a pro se petition for post-conviction relief. *Id.* at  
2 91-122. His Rule 32 petition focused on alleged failings of his prior counsel, including  
3 attorneys Brewer, Wood, Roser, and Rigg. *Id.* at 92. The petition also alleged various  
4 forms of misconduct involving prosecutors and judges. *Id.* at 100-03. The court  
5 dismissed Petitioner's Rule 32 petition. Doc. 26-6 at 99-114.

6 Petitioner filed several motions related to his Rule 32 petition, each of which was  
7 denied. First, Petitioner sought an injunction to obtain DNA testing in connection with  
8 the 2011 sexual abuse charge. *Id.* at 19. The court denied his request, finding that  
9 Petitioner had not provided a reasonable probability he would not have been convicted or  
10 would have obtained a more favorable sentence had DNA testing been conducted. *Id.* at  
11 59-60. Second, Petitioner sought court records and transcripts as part of his Rule 32  
12 proceedings. *Id.* at 2-4. The court ordered that he receive two transcripts, but not a  
13 January 21, 2011 transcript. *Id.* at 6. Third, Petitioner filed a request for discovery and  
14 an evidentiary hearing (*id.* at 62-65), which was denied (Doc. 27-5 at 79). Fourth,  
15 Petitioner filed a motion for judgment by default because the State had failed to timely  
16 respond (Doc. 26-6 at 79-81, 86-90, 92-94), which was denied (*id.* at 83, 96). Fifth,  
17 Petitioner filed a motion for leave to amend his Rule 32 petition (Doc. 26-7 at 14-19),  
18 which was also denied (*id.* at 69).

19 Petitioner filed a special action to appeal the dismissal of his petition for post-  
20 conviction relief. Docs. 26-7 at 71-73; 26-8 at 2-32. The Arizona Court of Appeals  
21 declined to exercise special action jurisdiction. Doc. 26-9 at 122-23.

## 22 **II. Legal Standard.**

23 A party may file specific, written objections to an R&R within fourteen days of  
24 being served with a copy of it. Rules Governing Section 2254 Cases 8(b) ("Section 2254  
25 Rules"); *see also* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. § 636(b)(1)(C). The Court must  
26 undertake a *de novo* review of those portions of the R&R to which specific objections are  
27 made. *Id.*; *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *United States v. Reyna-Tapia*, 328  
28 F.3d 1114, 1121 (9th Cir. 2003). The Court may accept, reject, or modify, in whole or in

1 part, the findings or recommendations made by the magistrate judge. Section 2254 Rules  
2 8(b); *see also* Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(C).

3 **III. Analysis.**

4 Petitioner objected to Judge Metcalf's R&R on 17 different grounds. The Court  
5 will refer to the objections using Petitioner's numbers. *See* Doc. 37.

6 **A. Grounds One and Two.**

7 Grounds One and Two are closely related. In Ground One, Petitioner asserts that  
8 Judge Metcalf erred in concluding that two of Petitioner's filings were untimely: his  
9 April 10, 2014 notice of appeal (Doc. 26-7 at 71-73) and his July 23, 2014 petition for  
10 review of the dismissal of his petition for post-conviction review (Doc. 37-4 at 17-35).  
11 *See* Doc. 37 at 1, 17. Petitioner argues that because he had requests for transcripts  
12 pending, the time within which he could file his petition for post-conviction review was  
13 tolled under A.R.S. § 13-4234(H) and Ariz. R. Crim. P. 32.4(d). Doc. 37 at 17.  
14 Petitioner asserts that the time between the filing of his notice, May 25, 2012 (*see*  
15 Doc. 37-1 at 7), and the date on which he received his last records, April 1, 2014 (*see id.*  
16 at 9), was tolled. Doc. 37 at 17. In Ground Two, Petitioner asserts that a miscarriage of  
17 justice occurred as a result of having to file his petition for post-conviction review before  
18 receiving the outstanding transcript. *Id.* at 2-3.

19 Both grounds lack merit. The Ninth Circuit "has specifically stated that federal  
20 habeas relief is not available to redress alleged procedural errors in state post-conviction  
21 proceedings." *Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998) (citations omitted)  
22 (finding state court judge's violation of Ariz. R. Crim. P. 32.4(c) during post-conviction  
23 proceedings inappropriate for federal habeas relief). Even if Petitioner's allegations that  
24 the trial court violated A.R.S. § 13-4234(H) and Ariz. R. Crim. P. 32.4(d) are true, this  
25 Court may not correct these errors on habeas review. Moreover, Petitioner has not  
26 asserted any specific harm or prejudice that resulted from being denied the transcripts.  
27 The Court concludes that Petitioner's filings were untimely, and any claims contained  
28 within the petition for post-conviction review are procedurally barred.

1           **B.     Ground Three.**

2           Petitioner objects to Judge Metcalf's conclusion that claims raised for the first  
3 time in a petition for review before the Arizona Supreme Court were not fairly presented.  
4 Docs. 34 at 27; 37 at 4. The Ninth Circuit has "held that to exhaust a habeas claim, a  
5 petitioner must properly raise it on every level of direct review." *Casey v. Moore*, 386  
6 F.3d 896, 916 (9th Cir. 2004) (citation omitted). Raising "federal constitutional claims  
7 for the first and only time to the state's highest court on discretionary review" is not fair  
8 presentation. *Id.* at 918. Petitioner did not file a direct appeal of his convictions or  
9 sentences for the 2009 stalking charge, the 2009 DUI charge, or the 2011 sexual abuse  
10 charge. Docs. 26-5 at 79; 34 at 6. As a result, no claims arising from these proceedings  
11 could be fairly presented in a petition for review to the Arizona Supreme Court.  
12 Petitioner did file a direct appeal of his conviction and sentence for his 2007 DUI. *See*  
13 Doc. 26-2 at 97. The Court carefully compared the four claims raised in Petitioner's  
14 direct appeal (*id.* at 98) with the claims raised in his petition for review (*see* Doc. 27-3 at  
15 46-62), and finds that the claims raised in his petition for review were not raised on direct  
16 review. The Court therefore finds that Petitioner's claims were not fairly presented in his  
17 petition for review to the Arizona Supreme Court.

18           **C.     Ground Four.**

19           Petitioner objects to Judge Metcalf's conclusion that Petitioner's double jeopardy  
20 claims in his special action to the Arizona Court of Appeals were not fairly presented  
21 because a special action is a discretionary proceeding. Docs. 34 at 33-34; 37 at 5.  
22 Petitioner insists that his double jeopardy claims were fairly presented simply because  
23 they were presented to the Court of Appeals in a special action. Doc. 37 at 5. Because  
24 Petitioner fails to account for the unique characteristics of an interlocutory appeal in the  
25 double jeopardy context, the Court agrees with Judge Metcalf.

26           A claim raised for the first time in a discretionary proceeding, such as a special  
27 action, is not fairly presented for purposes of habeas review. *See Roettgen v. Copeland*,  
28 33 F.3d 36, 38 (9th Cir. 1994) (citing *Castille v. Peoples*, 489 U.S. 346, 351 (1989)). A



double jeopardy claim, however, is fairly presented in a special action if it is used to obtain interlocutory<sup>1</sup> appellate review of the claim. *See State v. Moody*, 94 P.3d 1119, 1133, ¶ 22 (Ariz. 2004) (citation omitted). “The reasons underlying the preference for special action review of denials of motions to dismiss based on double jeopardy are obvious: Because the Double Jeopardy Clause guarantees the right to be free from subsequent prosecution, the clause is violated by the mere commencement of retrial.” *Id.* (citing *Abney v. United States*, 431 U.S. 651, 660-61 (1977)). Petitioner raised a variety of double jeopardy claims in his special action proceedings (*see* Doc. 26-8 at 26), but not as interlocutory appellate review. He brought those proceeding after the trial court’s final ruling on the entire case. Petitioner’s double jeopardy claims were not fairly presented for purposes of habeas corpus review.

#### **D. Ground Five.**

Petitioner asserts that Judge Metcalf wrongly concluded that five claims for ineffective assistance of counsel were not raised in his petition for post-conviction review. Docs. 34 at 45; 37 at 6. The five claims are as follows: (1) in the 2007 DUI, Roberts failed to raise the double jeopardy violation regarding the lesser included offense; (2) in the 2007 DUI, Brewer failed to file charges of false imprisonment based on the double jeopardy violation; (3) in the 2009 DUI and 2011 sexual abuse charge, Roser failed to compare the presentence report with the plea agreement and failed to object to the use of the additional charges in the 2007 DUI as a sentence enhancement; (4) in the 2009 DUI and 2011 sexual abuse charge, Roser failed to correct sentencing errors in the plea agreement admitting the probation violations; and (5) in the 2009 DUI and 2011 sexual abuse charge, Roser failed to ensure the sentencing minute entry reflected the vacatur of his misdemeanor conviction in the 2007 DUI. Doc. 34 at 45.

Claims presented for the first time in a petition for review of the denial of a petition for post-conviction review are unexhausted. *See* Ariz. R. Crim. P. 32.9(c); *see*

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<sup>1</sup> An interlocutory appeal is “[a]n appeal that occurs before the trial court’s final ruling on the entire case.” *Black’s Law Dictionary* (10th ed. 2014).



1 *also State v. Vera*, 334 P.3d 754, 756-57, ¶ 8 (Ariz. Ct. App. 2014). Petitioner contends  
2 that the first claim was raised in his petition for post-conviction review. *See* Doc. 37 at 6.  
3 The Court disagrees. The cited portion of the petition for post-conviction relief is  
4 discussing actions taken by Brewer, not Roberts. Doc. 26-5 at 93. The paragraph begins  
5 by referring to Brewer, not Roberts. *Id.* Roberts is not mentioned anywhere in that  
6 paragraph. *Id.* This ineffective assistance of counsel argument is clearly directed at  
7 Brewer, not Roberts. The four other claims are similarly not contained in the petition for  
8 post-conviction relief. Petitioner failed to present these five claims for ineffective  
9 assistance of counsel in his petition for post-conviction relief.

10 **E. Ground Six.**

11 Petitioner objects to Judge Metcalf's statement that Petitioner's counsel may have  
12 made "strategic choices" in declining to pursue certain claims. Doc. 37 at 6. Petitioner's  
13 objection is directed solely towards Judge Metcalf's formulation of the legal standard.  
14 He does not object, in Ground Six, to Judge Metcalf's application of the legal standard.  
15 A party wishing to object to magistrate judge's report and recommendation must file  
16 specific written objections. Fed. R. Civ. P. 72(b)(2) ("Within 14 days after being served  
17 with a copy of the recommended disposition, a party may serve and file *specific* written  
18 objections to the proposed findings and recommendations.") (emphasis added).  
19 Petitioner has failed to do so in this case.

20 **F. Ground Seven.**

21 Petitioner objects to Judge Metcalf's conclusion that "because, at the time  
22 Petitioner's [post-conviction relief] proceeding he had already fully served the sentence  
23 on the lesser included offense, any challenge by [post-conviction relief] counsel would  
24 have been futile." Docs. 34 at 48; 37 at 7. Petitioner asserts that had his counsel raised  
25 the double jeopardy issue, it would have "invalidated the indictment," which means that  
26 his subsequent convictions would not have resulted in probation violations and his 2007  
27 DUI would not have been counted as a prior felony. Doc. 37 at 7. The Court does not  
28 agree. Petitioner has not provided, nor has the Court found, authority for the proposition

1 that a double jeopardy violation vacates both the lesser included offense and the greater  
2 conviction. The greater conviction in the 2007 DUI would still count as a prior felony  
3 and the subsequent convictions remain probation violations. As Judge Metcalf  
4 concluded, because “the additional sentence was already served” and the greater offense  
5 from the 2007 DUI conviction stands, “any attack based on such sentence was moot.”  
6 Doc. 34 at 48.

7 **G. Ground Eight.**

8 Judge Metcalf concluded that Petitioner could have earlier raised his ineffective  
9 assistance of counsel claims against attorney Roberts for her failure to raise the double  
10 jeopardy issue in connection with his 2007 DUI conviction. Doc. 34 at 47-48. Petitioner  
11 objects, arguing that his petition for post-conviction relief in 2012 was his first  
12 opportunity to raise this issue in the state courts. Doc. 37 at 9. The Court does not agree.  
13 First, even if it is true, Petitioner’s allegation that “the trial court dropped the ball and  
14 never provided counsel” after he filed a notice of post-conviction relief does not entitle  
15 him to federal habeas relief. *See Ortiz*, 149 F.3d at 939 (The Ninth Circuit “has  
16 specifically stated that federal habeas relief is not available to redress alleged procedural  
17 errors in state post-conviction proceedings.”) (citations omitted). Second, as discussed  
18 above, there can no continuing prejudice stemming from this ineffective assistance of  
19 counsel claim because the Court of Appeals vacated the conviction and Petitioner already  
20 served the additional sentence.

21 **H. Ground Nine.**

22 Petitioner argues that attorney Roser’s failure to correct sentencing errors in the  
23 consolidated plea agreement constituted ineffective assistance of counsel. Docs. 34 at  
24 50-54; 37 at 10. The sentencing error that Petitioner complains of is that the plea  
25 agreement lists the violations of the terms of his probation for CR2007-01075, and not  
26 for CR2009-00017. Doc. 37 at 10. Petitioner contends that he was prejudiced because he  
27 was not permitted to rescind the plea agreement at the sentencing hearing and proceed to  
28 trial on the charges. *Id.* The Court has closely reviewed the transcript of the April 5,

2012 sentencing hearing. *See* Doc. 26-5 at 46-68. There is no truth to the assertion that Petitioner requested, and was denied the ability, to rescind the plea agreement during the sentencing hearing. The Court agrees with Judge Metcalf's conclusions that "it is clear that the parties utilized interchangeably the case numbers from the consolidated cases (CR2007-1075 and CR2009-0017) on the 2007 DUI," and that "Petitioner was admitting a violation of probation in the 2007 DUI and agreeing to be sentenced to a presumptive prison term for that violation." Doc. 34 at 53. Again, Judge Metcalf correctly concluded that "Petitioner ultimately received what he bargained for: a presumptive prison term on the aggravated DUI probation violation." *Id.*

### **I. Grounds Ten, Eleven, and Twelve.**

Petitioner argues that Judge Metcalf erred by finding that his claim of actual innocence was based on speculation that DNA testing could prove his innocence. Docs. 34 at 58-60; 37 at 11-12. Petitioner asserts that DNA testing could prove his actual innocence with respect to the DUI charge (Ground Ten) and the 2011 sexual abuse charge (Ground Eleven), and that it was error to deny him an evidentiary hearing (Ground Twelve). The Court again disagrees.

In Ground Ten, Petitioner asserts that the "State admitted that the blood test was *performed* outside the statutory window of 2 [hours], *see* A.R.S. [§] 28-1381(A)(2), which procedurally barred the State from using it as evidence." Doc. 37 at 11 (emphasis added). As an initial matter, Petitioner's interpretation of A.R.S. § 28-1381(A)(2) appears to be incorrect. *See State v. Stanley*, 172 P.3d 848, 853, ¶ 24 (Ariz. Ct. App. 2007) ("To avoid additional evidentiary hurdles, the police typically need to have the blood sample *drawn* within two hours of the arrest.") (citing A.R.S. § 28-1381(A)(2) (emphasis added)). More fundamentally, however, Petitioner seeks to improperly broaden his claim by asserting additional operative facts not presented to the state courts. *Brown v. Easter*, 68 F.3d 1209, 1212 (9th Cir. 1995). Petitioner's arguments involving DNA testing have all been directed at the sexual abuse case, not the DUI cases. *See, e.g.*, Docs. 26-5 at 96-97; 26-6 at 19-20, 22-57; 26-8 at 25. Petitioner's petition for a writ of

1 habeas corpus does not even address DNA testing in connection with Petitioner's DUIs.  
2 *See* Doc. 1 at 21. The Court therefore rejects Petitioner's Ground Ten.

3 In Ground Eleven, Petitioner contends that Judge Metcalf erred by rejecting  
4 Petitioner's assertion that DNA testing in the sexual abuse case could prove his actual  
5 innocence. Docs. 34 at 58-60; 37 at 12. Petitioner asserts that if he had "used his mouth,  
6 penis, and/or fingers then the alleged victim[']s DNA would [have] been transferred onto  
7 the Petitioner." Doc. 37 at 12. But Petitioner does not establish how this could exculpate  
8 him from the sexual abuse. As Judge Metcalf correctly notes, "[t]his case is not an  
9 ordinary case of mistaken identification of a stranger as a rapist." Doc. 34 at 59. There is  
10 ample incriminating evidence, even without inculpatory DNA evidence. The victim  
11 knew the Petitioner, she immediately identified him as the assailant, police officers found  
12 Petitioner in the area where the victim was assaulted, and Petitioner was extremely  
13 intoxicated. *Id.* Petitioner has failed to establish that DNA testing would show actual  
14 innocence. *United States v. Watson*, 792 F.3d 1174, 1180 (9th Cir. 2015) ("Where the  
15 presence or absence of the movant's DNA would not show actual innocence, there is no  
16 reason to test for it."); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557  
17 U.S. 52, 62 (2009) ("DNA testing alone does not always resolve a case. Where there is  
18 enough other incriminating evidence and an explanation for the DNA result, science  
19 alone cannot prove a prisoner innocent."). The Court therefore rejects Ground Eleven.

20 In Ground Twelve, Petitioner seeks an evidentiary hearing "because the lack of  
21 DNA transfer will prove the innocence of the Petitioner" in the sexual abuse case.  
22 Doc. 37 at 12. The decision of whether to hold an evidentiary hearing is soundly within  
23 the discretion of the district court. *Campbell v. Blodgett*, 982 F.2d 1356, 1358 (9th Cir.  
24 1993) (citation omitted). A petitioner may be entitled to additional discovery if good  
25 cause has been shown. Section 2254 Rules 6(a). As discussed above, Petitioner has  
26 failed to establish good cause for conducting DNA testing. Moreover, the question of  
27 whether the prosecutor complied with ER 3.8(g) and (h) of the Arizona Rules of  
28 Professional Conduct is not an appropriate issue for habeas review. *See* 28 U.S.C.

1 § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“Today, we reemphasize that it  
2 is not the province of a federal habeas court to reexamine state-court determinations on  
3 state-law questions. In conducting habeas review, a federal court is limited to deciding  
4 whether a conviction violated the Constitution, laws, or treaties of the United States.”)  
5 (citations omitted). The Court therefore rejects Ground Twelve.

6 **J. Ground Thirteen.**

7 Judge Metcalf concluded that because “all of Petitioner’s claims are procedurally  
8 defaulted, discovery is only appropriate as necessary to establish cause and prejudice or  
9 Petitioner’s actual innocence.” Doc. 34 at 61. Petitioner objects to Judge Metcalf’s  
10 conclusion that he should not be granted an evidentiary hearing because he has failed to  
11 establish cause and prejudice or actual innocence with respect to the Wood and Brewer  
12 interviews or the Roberts deposition. Doc. 37 at 13. The Court agrees with Judge  
13 Metcalf. Petitioner fails to explain how the interviews or the Roberts deposition could  
14 establish his actual innocence. The fact that he talked about legal strategy with his  
15 lawyers would not establish Petitioner’s actual innocence. In addition, Petitioner also  
16 alleges violations of A.R.S. § 13-4238(A) and Ariz. R. Crim. P. 32.8(a), which provide  
17 for evidentiary hearings during post-conviction proceedings in certain circumstances.  
18 Neither A.R.S. § 13-4238(A) nor Ariz. R. Crim. P. 32.8(a), however, provides an  
19 appropriate basis for federal habeas relief. *See Ortiz*, 149 F.3d at 939 (The Ninth Circuit  
20 “has specifically stated that federal habeas relief is not available to redress alleged  
21 procedural errors in state post-conviction proceedings.”) (citations omitted). The Court  
22 rejects Ground Thirteen.

23 **K. Ground Fourteen.**

24 Petitioner objects to Judge Metcalf’s conclusion that Petitioner has failed to  
25 establish how the complete booking video of his arrest for the 2007 DUI would establish  
26 his actual innocence. Docs. 34 at 61; 37 at 14. Petitioner argues that the lack of the  
27 complete booking video constitutes “prosecutorial misconduct causing the trial court[’s]  
28 judgment to be voided.” Doc. 37 at 14. The Court disagrees. As Judge Metcalf correctly

1 concluded, “[a]t most, Petitioner suggests that [the complete booking video] would  
2 reflect a falsification of the timing of the blood draw,” but he “fails to show that such  
3 falsification would establish his actual innocence.” Doc. 34 at 6. The Court therefore  
4 rejects Ground Fourteen.

5 **L. Ground Fifteen.**

6 Petitioner once again argues that his petition was not untimely, and therefore  
7 procedurally barred, based on the pending requests for transcripts. Doc. 37 at 15. This is  
8 merely a repackaging of Grounds One and Two. *See supra* Section III(A). For the  
9 reasons stated above, the Court rejects Ground Fifteen.

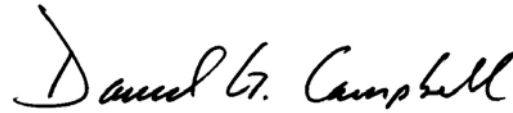
10 **M. Grounds Sixteen and Seventeen.**

11 In Ground Sixteen, Petitioner objects to Judge Metcalf’s statement that “any  
12 ineffectiveness of [post-conviction relief] counsel in failing to raise [five claims of  
13 ineffective assistance of counsel against trial and appellate counsel set forth above in  
14 Ground Five] could constitute cause under *Martinez* [*v. Ryan*, 132 S. Ct. 1309 (2012)].”  
15 Docs. 34 at 46; 37 at 16. In Ground Seventeen, Petitioner argues that the trial court’s  
16 correction of a sentencing error proved that attorney Rigg provided ineffective assistance.  
17 Docs. 34 at 10; 37 at 16. A party wishing to object to a magistrate judge’s report and  
18 recommendation must file specific written objections. Fed. R. Civ. P. 72(b)(2) (“Within  
19 14 days after being served with a copy of the recommended disposition, a party may  
20 serve and file *specific* written objections to the proposed findings and  
21 recommendations.”) (emphasis added). Petitioner fails to argue with any specificity that  
22 any of the five claims in Ground Sixteen constitute cause under *Martinez*. Nor does he  
23 specifically object to any portion of Judge Metcalf’s R&R in Ground Seventeen. The  
24 Court therefore rejects Grounds Sixteen and Seventeen.

**IT IS ORDERED:**

1. Magistrate Judge Metcalf's R&R (Doc. 34) is **accepted**, Petitioner's petition for writ of habeas corpus (Doc. 1) is **denied**, and a certificate of appealability is **denied**.
2. The Clerk is directed to terminate this action.

Dated this 11th day of March, 2016.



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David G. Campbell  
United States District Judge